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Collective Representation and Employee Voice in the US Public Sector Workplace: Looking North for Solutions?

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Collective Representation and Employee Voice in the US Public Sector Workplace: Looking North for Solutions?

Abstract

Legislation enacted in many states following the 2010 elections in the United States strengthened unilateral public employer control and weakened employee voice. This rebalancing of power occurred in the context of state public employee labour relations acts modeled on the National Labor Relations Act (NLRA), but with a narrower scope of bargaining than in the private sector. This narrow scope channels unions' voice away from the quality of public services and towards protecting members from the effects of decisions unilaterally imposed by management. The Supreme Court of Canada has held that the freedom of association guaranteed by the Charter of Rights and Freedoms includes a right to collective bargaining, but that this right need not be modelled on the NLRA. This article explores the evolving Canadian jurisprudence decoupling the right to a voice at work from an NLRA-style model as an alternative approach for US public sector labour law reform.

Keywords

Labor unions; Public service employment; Collective bargaining; United States. National Labor Relations Act; Canada

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MARTIN MALIN*

Legislation enacted in many states following the 2010 elections in the United States strengthened unilateral public employer control and weakened employee voice. This rebalancing of power occurred in the context of state public employee labour relations acts modeled on the *National Labor Relations Act (NLRA)*, but with a narrower scope of bargaining than in the private sector. This narrow scope channels unions' voice away from the quality of public services and towards protecting members from the effects of decisions unilaterally imposed by management. The Supreme Court of Canada has held that the freedom of association guaranteed by the *Charter of Rights and Freedoms* includes a right to collective bargaining, but that this right need not be modelled on the *NLRA*. This article explores the evolving Canadian jurisprudence decoupling the right to a voice at work from an *NLRA*-style model as an alternative approach for US public sector labour law reform.

Les lois passées dans plusieurs États à la suite des élections de 2010 aux États-Unis ont renforcé le contrôle unilatéral de l'employeur public et affaibli la voix au chapitre des employés. Ce rééquilibrage du pouvoir est survenu dans le contexte des lois sur les relations de travail des employés du secteur public d'État selon le modèle de la *National Labor Relations Act (NLRA)*, mais avec une moindre portée de négociation que dans le secteur privé. Cette portée amoindrie détourne la voix des syndicats de la qualité des services publics et l'oriente vers la protection des membres contre les effets de décisions imposés unilatéralement par la direction. La Cour suprême du Canada soutient que la liberté d'association garantie par la *Charte des droits et libertés* comprend le droit à la négociation collective, mais qu'il n'est

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pas nécessaire que ce processus soit selon le modèle de la *NLRA*. Cet article se penche sur l'évolution de la jurisprudence canadienne, qui dissocie d'un modèle semblable à la *NLRA* le droit de parole au travail, en tant qu'approche de rechange pour la réforme du droit du travail du secteur public aux États-Unis.

I.	THE EVOLUTION OF US PUBLIC SECTOR LABOUR LAW: STICKING TO AN <i>NLRA</i> MODEL.....	906
II.	THE <i>CHARTER</i> , THE <i>CONSTITUTION</i> AND US LABOUR LAW	920
III.	THE <i>CHARTER</i> AS A GUIDE FOR US PUBLIC SECTOR LABOUR LAW REFORM.....	927
IV.	CONCLUSION	935

THE ELECTION IN 2010 of conservative Republican legislative majorities and governors in many states led to a major retrenchment in public employee collective bargaining rights in the United States. Fuelling the retrenchment was the view that public employee collective bargaining was bad for the public. For example, in an op-ed in the *Wall Street Journal*, Wisconsin Governor Scott Walker attacked public employee collective bargaining agreements as providing for excessive wages and benefits, rewarding seniority over merit, and blocking needed innovation and reform.¹ The common aim of the legislation enacted in numerous states following the 2010 elections was to strengthen unilateral employer control and weaken employee voice. This rebalancing of power occurred in the context of state public employee labour relations acts that are largely modeled on the *National Labor Relations Act (NLRA)*,² the federal statute that governs most private sector employers, employees, and unions in the United States. Unlike Canadian labour law, the *NLRA* classifies subjects of bargaining as mandatory, permissive, or prohibited.³ Only subjects classified as mandatory need be bargained. All others are left to the unilateral control of the party with the decision-making power, typically the employer.⁴

In the US public sector, courts and labour relations agencies have defined mandatory subjects of bargaining much more narrowly than in the private sector. This is largely due to concerns that many terms and conditions of employment also raise issues of public policy which, the authorities reason, should be resolved in the public political process rather than at a bargaining table to which only the

1. Scott Walker, "Why I'm Fighting for Wisconsin," Op-ed, *The Wall Street Journal* (10 March 2011) A17.
2. 29 USC §§ 151-69 (2012) [*NLRA*].
3. *National Labor Relations Board v Wooster Division, Borg-Warner Corp*, 356 US 342, 78 S Ct 718 (1958) [*Borg-Warner*].
4. *First National Maintenance Corp v National Labor Relations Board*, 452 US 666, 101 S Ct 2573 (1981) [*First National Maintenance*].

union and employer have access. Issues such as class size, school calendar, teacher evaluation, layoffs, subcontracting, drug testing, and use of civilian police review boards that directly affect employee working conditions have, nevertheless, been held not to be mandatory subjects because they raise questions of public policy more appropriately left to the political process. The result of such a narrow scope of bargaining is to channel unions away from having a voice on matters that can improve the quality of public services, towards bread and butter issues of wages and benefits, as well as protection of members from the effects of decisions unilaterally imposed by management. Unions' efforts to protect their members from management's unilateral action are seen by some as union obstructionism to reform. Unions' success in the role to which they have been relegated has led to backlash, further narrowing the scope of bargaining and otherwise reducing worker voice.⁵

The Supreme Court of Canada (SCC) has held that the *Charter of Rights and Freedoms*' right to freedom of association includes a right to collective bargaining.⁶ The US Supreme Court has recognized that public employees' freedom of association includes a right to join a union, but—reasoning that government employers are not constitutionally required to listen to public employees' unions—has rejected the idea that freedom of association might include a right to collective bargaining. The US Supreme Court has held that freedom of association does not even include a right of individual union members to be represented by their union in their employer's unilaterally promulgated and administered grievance procedure.⁷ Because of such diametrically opposing perspectives on freedom of association, it is tempting to dismiss Canadian *Charter* jurisprudence summarily as having nothing to offer US labour law. This would be too hasty. In *Fraser v Ontario*, the SCC held that the right to collective bargaining encompassed within the right to free association does not mandate a Wagner Act model of collective bargaining.⁸ This decoupling of the right to a voice at work from a right to an *NLRA*-like model of collective bargaining suggests that the evolving Canadian jurisprudence concerning freedom of association should be examined as an alternative to the present

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5. See Martin H Malin, "The Paradox in Public Sector Labor Law" (2009) 84 Ind LJ 1369; Martin H Malin & Charles Taylor Kerchner, "Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship?" (2007) 30 Harv JL & Pub Pol'y 885.
 6. See *Ontario (AG) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3 [*Fraser*]; *Health Services & Support Facilities Subsector Bargaining Association v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 [*BC Health*]. The SCC builds on a foundation it first laid down in *Dunmore v Ontario (AG)*, 2001 SCC 2011, [2001] 3 SCR 1016 [*Dunmore*].
 7. See *Smith et al v Arkansas State Highway Employees, Local 1315*, 441 US 463, 99 S Ct 1826 (1979) [*Smith*].
 8. The *Wagner Act* is the original version of the *NLRA*.

model of US public sector labour law reform, which increases management unilateralism while weakening employee voice.

This article explores the evolving jurisprudence under the *Charter* as an inspiration for reforming US public sector labour law to enhance worker voice in ways that can benefit the public as well as workers. Part I discusses the evolution of public sector collective bargaining rights in the United States and the law's persistent attachment to the *NLRA* model. Part II contrasts SCC and US Supreme Court jurisprudence concerning the right to free association and collective bargaining. It suggests that the differences are related to the different approaches to property rights taken in the *Charter* and the US *Constitution*. This section urges that the different approaches to property rights might justify different approaches to the right to collective bargaining in the private sector, but they do not justify different approaches in the public sector. Part III focusses on the holding in *Fraser* that the right to freedom of association mandates a process that permits meaningful pursuit of collective workplace goals and, at a minimum, a right to make collective representations and to have those representations considered in good faith. This section argues that this approach to freedom of association is a useful vehicle for reforming US public sector labour law and for increasing worker voice in ways that benefit not only public employees, but also the public at large.

I. THE EVOLUTION OF US PUBLIC SECTOR LABOUR LAW: STICKING TO AN *NLRA* MODEL

The right to organize and bargain collectively was relatively late in coming to the US public sector.⁹ As late as 1963, almost three decades after the *Wagner Act* established the right to organize and bargain collectively in the private sector, the Michigan Supreme Court upheld the City of Muskegon's prohibition on police officer membership in labour unions.¹⁰ Even today, some states prohibit local governments from engaging in collective bargaining.¹¹

When states began enacting public sector collective bargaining statutes in the 1960s and 1970s, a comprehensive model had been well-established in the private sector. Enacted as the *Wagner Act of 1935* and amended by the *Taft-Hartley Act of 1947* and *Landrum-Griffin Act of 1959*, the *NLRA* granted employees the right to

9. See generally Joseph E Slater, *Public Workers: Government Employee Unions, the Law, and the State, 1990-1960* (Ithaca, NY: Cornell University Press, 2004).

10. *AFSCME Local 201 (AFL-CIO) v City of Muskegon*, 120 NW (2d) 197, 369 Mich 384 (Sup Ct 1963).

11. See e.g. NC Gen Stat Ann §§ 95-98 (2012); Va Code Ann §§ 40.1-57.2 (2012).

engage in concerted activity for mutual aid and protection, and the right to refrain from such activity.¹² It secured these rights with a series of rules regarding employer and union unfair labour practices.¹³ The right to bargain collectively depends on a majority of employees in an appropriate bargaining unit designating or selecting a labour organization, which then becomes the exclusive representative for all employees in the unit.¹⁴

The legal rules governing collective bargaining depend on whether the matter at issue is a mandatory subject of bargaining.¹⁵ If a matter is a mandatory subject of bargaining, a party may not undertake unilateral action unless and until it has bargained to impasse.¹⁶ However, a party may insist on its position to impasse. Each party has a duty to provide the other party with relevant information unless the first party's interest in keeping the information confidential outweighs the requesting party's interests in having the information for the bargaining process.¹⁷ With respect to a mandatory subject, an employer may not bypass the exclusive representative and deal directly with individual employees unless the exclusive representative consents to such direct dealing.¹⁸

When a matter is a permissive subject of bargaining, a party may act unilaterally without negotiating at all.¹⁹ A party violates the law by insisting on its position with respect to a permissive subject to the point of impasse.²⁰ The fate of permissive subjects of bargaining is left to the complete unilateral discretion of the party with the power to control them—usually the employer.

The *NLRA* model embraces freedom of contract. The National Labor Relations Board (NLRB) is empowered to regulate the process of collective bargaining, but not the substantive outcomes.²¹ The statute expressly declares that the duty to bargain in

12. *NLRA*, *supra* note 2, § 157.

13. *Ibid.*, §§ 158(a), (b), (c).

14. *Ibid.*, § 159.

15. See *Borg-Wagner*, *supra* note 3. See also *First National Maintenance*, *supra* note 4.

16. See *National Labor Relations Board v Katz et al*, 369 US 736, 82 S Ct 1107 (1962). Most cases involve unilateral changes made by employers because the employer typically has the power to control terms and conditions of employment. The doctrine, however, also constrains unions in the rare cases where unions have such power. See *e.g. Associated Home Builders of Greater East Bay, Inc. v National Labor Relations Board*, 352 F (2d) 745, 60 LRRM 2345 (9th Cir 1965).

17. See *Detroit Edison Co v National Labor Relations Board*, 440 US 301, 59 L Ed (2d) 333 (1979); *National Labor Relations Board v Truitt Manufacturing Co*, 351 US 149, 76 S Ct 753 (1956).

18. See *J I Case Co v National Labor Relations Board*, 321 US 332, 64 S Ct 576 (1944).

19. See *First National Maintenance*, *supra* note 4.

20. See *Borg-Warner*, *supra* note 3.

21. See *H K Porter Co v National Labor Relations Board*, 397 US 99, 90 S Ct 821 (1970) [*HK Porter*].

good faith does not require reaching agreement or making concessions.²² The *NLRA* relies on each party's economic weapons and on threats to resort to such weapons to provide the motivation to reach agreement.²³

As states enacted public sector labour relations acts, they used the *NLRA* model as their starting point, tweaking the model as they deemed necessary for the public sector. For example, most states group employees into bargaining units that are much larger than in the private sector.²⁴ The overwhelming majority of states prohibit strikes and other concerted work stoppages, and the small minority that recognize a right to strike place greater restrictions on the right than are found under the *NLRA*.²⁵ In place of a right to strike, many states provide for interest arbitration or non-binding fact-finding.²⁶

Most relevant to this article, states have mandated collective bargaining over a much narrower range of issues in the public sector than under the *NLRA*. Some states have refused to recognize a category of permissive subjects of bargaining. They find bargaining is either mandatory or prohibited.²⁷ Some states limit mandatory subjects of bargaining to those expressly listed in their labour relations act.²⁸ Many have enacted statutory management rights provisions.²⁹

Most states follow the *NLRA*, imposing a duty to bargain over wages, hours, and other terms and conditions of employment, although the duty is often tempered by a statutory management rights provision. Even without a management rights provision, however, states have interpreted "other terms and conditions of employment" more narrowly than the term has been interpreted under the *NLRA*. States recognize that, whereas in the private sector collective bargaining is largely an

22. *NLRA*, *supra* note 2, § 158(d).

23. See *National Labor Relations Board v Insurance Agents' International Union*, 361 US 477, 80 S Ct 419 (1960).

24. See *e.g. Michigan Education Association v Alpena Community College*, 577 NW (2d) 457, 457 Mich 300 (Sup Ct 1998) The court held that the Michigan Employment Relations Commission is mandated to select the largest possible bargaining unit of employees sharing a community of interest. See generally Andria S Knapp, "Anatomy of a Public Sector Bargaining Unit" (1985) 35 Case W Res L Rev 395.

25. See generally Martin H Malin, "Public Employees' Right to Strike: Law and Experience" (1993) 26 U Mich JL Ref 313.

26. See generally Martin H Malin, Ann C Hodges & Joseph E Slater, *Public Sector Employment: Cases and Materials*, 2d ed (St Paul, Minn: West, 2011) at ch 10.

27. See *e.g. Local 195, International Federation of Professional and Technical Engineers v New Jersey*, 443 A (2d) 187, 88 NJ 393 (Sup Ct 1982); *Aberdeen Education Association v Aberdeen Board of Education*, 215 NW (2d) 837, 88 SD 127 (Sup Ct 1974) [*Aberdeen*].

28. See *e.g. Iowa Code* § 20.9 (2013); *Kans Stat Ann* § 75-4327(b) (2013).

29. See *e.g. 5 Ill Comp Stat* 315/4 (2013); *Mont Code Ann* § 39-31-303 (2013); *43 Pa Stat* § 1101.702 (2013).

economic process, in the public sector it is largely a political process. As observed by the Wisconsin Supreme Court:

In the private sector, collective bargaining is limited by the need to protect the “core of entrepreneurial control,” particularly power over the deployment of capital. If resources are to be employed efficiently in a market economy, capital must be mobile and responsive to market forces.

...

Different concerns are present in the public sector, however... In the public sector, the principal limit on the scope of collective bargaining is concern for the integrity of political processes.³⁰

Concern that mandating bargaining over various terms and conditions of employment can undermine the political process has led many states to find that public employers need not bargain over many subjects on which bargaining would be required in the private sector. In *City of Brookfield v Wisconsin Employment Relations Commission*, the Wisconsin Supreme Court held that an economically motivated decision to lay off firefighters was not a mandatory subject of bargaining, characterizing it as “a matter primarily related to the exercise of municipal powers and responsibilities and the integrity of the political processes of municipal government.”³¹ Expressing concern that collective negotiations not impinge on the ability of “the whole people [to] speak by means of laws enacted by their representatives,” the South Dakota Supreme Court prohibited bargaining on teacher preparation periods, the scheduling of teacher conferences, and the availability of aides to perform non-teaching duties such as playground supervision.³² Similarly, the Maryland Court of Appeals held that school calendar and employee reclassifications were prohibited subjects of bargaining, reasoning that:

Local [school] boards are state agencies, and, as such, are responsible to other appropriate state officials and to the public at large. Unlike private sector employers, local boards must respond to the community’s needs. Public school employees are but one of many groups in the community attempting to shape educational policy by exerting influence on local boards. To the extent that school employees can force boards to submit matters of educational policy to an arbitrator, the employees can distort the democratic process by increasing their influence at the expense of these other groups.³³

30. *Unified School District No 1 of Racine County v Wisconsin Employment Relations Commission*, 259 NW (2d) 724 at 730, 81 Wis (2d) 89 (Sup Ct 1977) [*Racine County*].

31. 275 NW (2d) 723 at 728, 87 Wis (2d) 819 (Sup Ct 1978).

32. *Aberdeen*, *supra* note 27 at 841.

33. *Montgomery County Education Association v Board of Education of Montgomery County*, 534 A (2d) 980 at 987, 311 Md 303 (Ct App 1987) [citation omitted] [*Montgomery County*].

Every issue concerning public employees' terms and conditions of employment is potentially an issue of public policy. Even such core bread and butter issues as wages and benefits raise issues of allocation of public resources. State courts have generally adopted a balancing test to determine whether they will mandate bargaining. As articulated by the Wisconsin Supreme Court, the focus is on

whether a particular decision is primarily related to the wages, hours and conditions of employment of the employees, or whether it is primarily related to the formulation or management of public policy. Where the governmental or policy dimensions of a decision predominate, the matter is properly reserved to decision by the representatives of the people.³⁴

Articulating a balancing test is much easier than applying it. As aptly described by the Iowa Supreme Court:

[T]he balancing test requires courts to balance the apples of employee rights against the oranges of employer rights. No court has been able to successfully advance a convincing formula for determining how many employee rights apples it takes to equal an employer rights orange.³⁵

Consequently, the outcome of the balancing test depends on the viewpoint of the authorities reading the scales. Not surprisingly, jurisdictions have read the scales differently with respect to particular issues. Conflicting results have been reached on numerous subjects including class size,³⁶ school calendar,³⁷ drug testing,³⁸

34. *Racine County*, *supra* note 30 at 731-32.

35. *Waterloo Education Association v Iowa Public Employment Relations Board*, 740 NW (2d) 418 at 424, 185 LRRM 2291 (Iowa 2007).

36. Compare *West Hartford Education Association v DeCourcy et al*, 295 A (2d) 526 at 536-37, 162 Conn 566 (Sup Ct 1972); *Boston Teachers Union, Local 66 v School Committee of Boston*, 350 NE (2d) 707 at 713-14, 370 Mass 455 (Sup Jud Ct 1976). Compare *Hillsborough Classroom Teachers Association v School Board of Hillsborough County*, 423 So (2d) 969 at 969, 1982 Fla App LEXIS 21830 (Dist Ct App, 1st Dist); *National Education Association-Topeka, Inc v Unified School District 501*, 592 P (2d) 93 at 98, 225 Kan 445 (Sup Ct 1979); *City of Biddeford v Biddeford Teachers Association*, 304 A (2d) 387 at 403, 83 LRRM 2098 (Me Sup Jud Ct); *School District of Seward Education Association v School District of Seward*, 199 NW (2d) 752 at 759, 188 Neb 772 (Sup Ct 1972); *Dunellen Board of Education v Dunellen Education Association and Public Employment Relations Commission*, 311 A (2d) 737 at 741, 64 NJ 17 (Sup Ct 1973); *West Irondequoit Teachers Association v Helsby*, 315 NE (2d) 775, 35 NY (2d) 46 (Ct App 1974).

37. See *State v Connecticut State Board of Labor Relations*, 1993 WL 7261 at para 6, 8 Conn L Rptr 210 (Super Ct, Hartford Dist). Compare *Montgomery County*, *supra* note 33 at 980.

38. See *Holliday v City of Modesto*, 280 Cal Rptr 206 at 206, 229 Cal App (3d) 528 (5th App Dist 1991); *County of Cook v Licensed Practical Nurses Association of Illinois*, 671 NE (2d) 787 at 792-93, 284 Ill App (3d) 145 (App Ct, 1st Dist, 3d Div 1996). Compare *Fraternal Order of Police, Miami Lodge 20 v City of Miami*, 609 So 2d 31 at 31, 144 LRRM 2341 (Fla Sup Ct

smoking,³⁹ and subcontracting.⁴⁰

The question of whether a matter is considered a mandatory subject of bargaining carries high stakes. If a matter is not a mandatory subject, the union is cut out completely. For example, the employer has no obligation to provide the union with information relevant to a non-mandatory subject of bargaining.⁴¹ Similarly, if a matter is not a mandatory subject, the employer may bypass the union completely and choose individual employees from whom to seek input.⁴²

By shutting unions out of a legal right to voice in many decisions that affect the workplace, the law leads unions to focus on the bread and butter issues that they have a right to negotiate, and to focus on protecting their members from the consequences of decisions made unilaterally by management.

Unions' success in the narrow areas into which they have been channelled has led to backlash against public employee collective bargaining. Significant backlash occurred in the 1990s. For example, Republican Michigan governor John Engler defeated incumbent Democrat James Blanchard in 1990 and was re-elected in 1994 in part by demonizing the Michigan Education Association.⁴³ In 1994, Michigan enacted PA 112 which prohibited bargaining on: the identity of a school district's group insurance carrier, the starting day of the school term, the amount of required pupil contact time, composition of site-based decision-making bodies, decisions whether to provide inter-district or intra-district open enrolment opportunities, the decision to operate a charter school, the decision to contract

1992); *Law Enforcement Labor Services v Sherburne County*, 695 NW (2d) 630, 177 LRRM 2232 (Minn App 2005).

39. See *Newark Valley Central School District v Public Employment Relations Board*, 632 NE (2d) 443 at 444, 83 NY (2d) 315 (Ct App 1994). Compare *Local 1186 of Council No 4 v State Board of Labor Relations*, 620 A (2d) 766, 224 Conn 666 (Sup Ct 1993).

40. See *Appeal of Hillsboro-Deering School District (New Hampshire Public Employee Labor Relations Board)*, 737 A (2d) 1098, 144 NH 27 (Sup Ct 1999). Compare *Amalgamated Transit Union, Local 1593 v Hillsborough Area Regional Transit Authority*, 742 So (2d) 380 at 380, 163 LRRM 2695 (Fla Dist Ct App 1999); *City of Belvidere v Illinois State Labor Relations Board*, 692 NE (2d) 295 at 305, 181 Ill (2d) 191 (Sup Ct 1998); *In re Local 195*, 443 A (2d) 187 at 194, 88 NJ 393 (Sup Ct 1982).

41. See e.g. *Village of Franklin Park v Illinois State Labor Relations Board and International Association of Firefighters, Local 1526*, 638 NE (2d) 1144 at 1148, 265 Ill App (3d) 997 (1st Dist, 4th Div 1994) (relying on *NLRA* precedent).

42. See e.g. *Corpus Christi Fire Fighters Association v City of Corpus Christi*, 10 SW (3d) 723, 163 LRRM 2688 (Tex App 1999).

43. See William Lowe Boyd, David N Plank & Gary Sykes, "Teachers Unions in Hard Times" in Tom Loveless, ed, *Conflicting Missions? Teachers Unions and Educational Reform* (Washington, DC: Brookings Institution Press, 2000) 174 at 176-77.

out non-instructional support services, the decision to use volunteers for any services, and decisions to use instructional technology on a pilot basis.⁴⁴ In urging support for the bill, the *Grand Rapids Press* editorialized:

[MEA's] longstanding stranglehold on the bargaining process has given Michigan teachers a Rolls-Royce health-insurance plan, some of the highest school salaries in the country and virtual immunity from the state law forbidding public employee strikes. A consequence is that Michigan school costs from 1980 through '92 rose an average of 8.1 percent a year, with the difference being passed along to citizens in their property-tax bills.⁴⁵

The state also abolished property taxes as a source of school funding and tied state funding to the number of students in a district, while providing for large numbers of charter schools and allowing students to attend school outside their districts of residence. In signing this legislation, Governor Engler declared the end of "the power and control the teacher unions have had over education policies in Michigan."⁴⁶ In 1996, the state increased the mandatory school year from 180 to 190 instructional days, with no increase in teacher compensation.⁴⁷

In Illinois, the 1995 *Chicago School Reform Act* prohibited bargaining over the following decisions and their impact on employees: charter school proposals and leaves of absence to work for a charter school, subcontracting, layoffs and reductions in force, class size, class staffing and assignment, class schedules, academic calendar, hours and places of instruction, pupil assessment policies, use and staffing of pilot programs, and use of technology and staffing to provide technology.⁴⁸ Contemporary media accounts suggest that the restrictions on bargaining were aimed at the Chicago Teachers Union.⁴⁹

The backlash swept over teacher unions in other states as well. Oregon amended its public employee collective bargaining statute to exclude from mandatory bargaining such subjects as class size, the school calendar, and teacher evaluation criteria.⁵⁰ In 1993, Wisconsin enacted the qualified economic offer (QEO), which essentially pre-empted bargaining over school employee

44. Mich PA 112 of 2 May 1994 (codified at Mich Comp Laws § 423.215).

45. "Senate's turn on school costs: House-passed bill shifts control from MEA to taxpayers, boards," *Grand Rapids Press* (19 April 1994) A8.

46. Boyd, Plank & Sykes, *supra* note 43 at 179 [citation omitted].

47. *Ibid* at 181.

48. 115 Ill Comp Stat 5/4.5 (effective 30 May 1995).

49. See e.g. Doug Finke & Amy E Williams, "GOP Plan for Chicago Schools Takes Aim at Union," *The State Journal-Register* (11 May 1995) 1.

50. Act of 6 June 1995, c 286, § 1, 1995 Or Laws (codified at Or Rev Stat Ann § 243.650(7)(e)).

wages as long as the school district's wage offer met a prescribed formula.⁵¹ Ohio prohibited bargaining on state university faculty workloads.⁵² Pennsylvania adopted Act 46⁵³ in 1998, which provided that whenever the Philadelphia school system was found to be in financial distress, it would not be required to bargain over subcontracting, reductions in force, the school calendar, and teacher preparation time, among other matters.⁵⁴

The backlash was not confined to education. In New Mexico, the entire public sector collective bargaining statute expired when a Republican governor vetoed legislation that would have extended it.⁵⁵

The first decade of the 21st century saw a resurgence in public employee collective bargaining rights. Illinois amended the *Chicago School Reform Act* to make permissive bargaining over the decisions that had previously been prohibited and to mandate bargaining over the impact of those decisions on employees.⁵⁶ Wisconsin repealed the QEO and mandated bargaining over teacher preparation time and changes to teacher evaluation plans.⁵⁷ Wisconsin also extended bargaining rights to state university faculty and research assistants.⁵⁸ Numerous states extended collective bargaining rights to home health care aides and in-home daycare providers by designating the state the employer of record for collective bargaining purposes; otherwise, they would be considered independent contractors.⁵⁹ In 2003, New Mexico enacted a public employee collective bargaining statute that was stronger than the one that expired four years earlier.⁶⁰ In 2004,

51. Wis Act 16 of 10 August 1993, § 2207(aho), 1993 Wis Sess Laws 26 (codified at Wis Stat Ann § 111.70(1)(nc)). In 2009, Wisconsin repealed the QEO in Wis Act 28 of 29 June 2009, Wis Sess Laws 179 [2009 Wis Act 28].

52. Act of 1 July 1993, Ohio Laws File 30 (codified at Ohio Rev Code Ann § 3345.45). See also *Central State University v American Association of University Professors*, 526 US 124, 119 S Ct 1162 (1999) (upholding constitutionality of the prohibition).

53. Act of April 1998, PL No 1998-46, Pa Sess Laws 270.

54. See David J Strom & Stephanie S Baxter, "From the Statehouse to the Schoolhouse: How Legislatures and Courts Shaped Labor Relations for Public Education Employees During the Last Decade" (2001) 30 JL & Educ 275 at 295.

55. See Michael Coleman, "Union Suit Against Gov Rejected," *Albuquerque Journal* (1 July 1999) A1 (WL).

56. Ill Pub Act 93-0003 § 10 (effective 16 April 2003).

57. 2009 Wis Act 28, *supra* note 51.

58. *Ibid.*

59. See generally Pegg R Smith, "The Publicization of Home-Based Care Work in State Labor Law" (2008) 92 Minn L Rev 1390.

60. *Public Employee Bargaining Act*, c 4, 2003 NM Sess Laws 38 (codified at NM Stat Ann §§ 10-7E-1-10-7E-26).

Oklahoma extended collective bargaining rights to employees of municipalities with populations of 35,000 or more.⁶¹

The backlash following the 2010 elections made the backlash of the 1990s look tame. Oklahoma repealed the collective bargaining statute for municipal employees that it had enacted seven years earlier.⁶² Tennessee repealed the *Education Professionals Negotiations Act*, which had provided teachers with the right to organize and bargain collectively since 1978, and replaced it with the *Professional Educators Collaborative Conferencing Act* of 2011 (CCA).⁶³ The CCA provides for proportionate representation for all organizations and for the option of “unaffiliated,” which receive at least fifteen per cent of the vote in elections conducted at three-year intervals.⁶⁴ Furthermore, it mandates collaborative conferencing with respect to a laundry list of subjects. Collaborative conferencing is defined as:

the process by which [the parties] meet at reasonable times to confer, consult and discuss and to exchange information, opinions and proposals on matters relating to the terms and conditions of professional employee service, using the principles and techniques of interest-based collaborative problem-solving.⁶⁵

Some states did not follow the lead of Oklahoma and Tennessee in repealing their collective bargaining statutes, but instead stripped specific groups of employees of their collective bargaining rights. Wisconsin took away collective bargaining rights from state university faculty, all employees of the University of Wisconsin hospitals and clinics, and day care and home health care providers.⁶⁶ Nevada took bargaining rights away from doctors, lawyers, and some supervisors.⁶⁷

61. *Municipal Employee Collective Bargaining Act*, c 62, § 3, s 3(12), 2004 Okla Sess Laws 332 (codified at Okla Stat tit 11 §§ 51-200-51-220). Oklahoma repealed these rights in US, HB 1593, 53d Legis, 1st Sess, Okla, 2011.

62. *Ibid.*

63. Tenn Pub Ch No 378 of 1 June 2011 (codified at Tenn Code Ann § 49-5-601).

64. The CCA states that a vote for “unaffiliated” reflects that the employee “does not have a preference as to a professional employees’ organization.” See *ibid*, § 49-5-605(2)(b). If unaffiliated receives at least 15 per cent of the vote, a joint employee-management committee, which the statute requires to run the election, selects the representative of the unaffiliated. See *ibid*, § 49-5-605(b)(5).

65. *Ibid*, § 49-5-602(2).

66. Wis Act 10 of 11 March 2011, §§ 265, 279, 280, 2011 Wis Sess Laws 23 [2011 Wis Act 10]. These provisions took away collective bargaining rights from state university faculty, University of Wisconsin hospitals and clinics, and day and home health care providers, respectively.

67. US, SB 98, 76th Sess, Nev, 2011, § 6 (4-5) (codified at Nev Rev Stat § 288.140 (2011)).

The backlash following the 2010 elections followed the pattern of the 1990s in narrowing the scope of bargaining. Most of the new restrictions stripped workers of their voice in matters other than core bread and butter issues. Idaho limited negotiations for teachers to the matter of “compensation,” which it defined as salary and benefits, including insurance, leave time, and sick leave.⁶⁸ Previously, bargaining subjects were determined by an agreement between the parties. The Idaho enactment also limited collective bargaining agreements to one fiscal year, 1 July through 30 June, and prohibited evergreen clauses, which are provisions that allow a contract to continue until a new one is reached.⁶⁹ Idaho voters repealed the enactment by referendum in November 2012.⁷⁰

Similar to Idaho, Indiana limited collective bargaining for teachers to wages, salary, and wage-related fringe benefits, including insurance, retirement benefits, and paid time off.⁷¹ The statute permits collective bargaining agreements to have grievance procedures, but deletes the prior law’s express authorization for a grievance procedure to culminate in binding arbitration.⁷² The new statute prohibits bargaining on everything else, including express prohibitions on bargaining about the school calendar, teacher dismissal procedures and criteria, restructuring options, and contracting with an educational entity that provides post-secondary credits to students.⁷³ The statute also prohibits any contract that would place a school district in a budgetary deficit⁷⁴ and prohibits collective bargaining agreements from extending beyond the end of the state budget biennium.⁷⁵ The new law repeals a prior provision that authorized parties to agree to arbitrate teacher dismissals.⁷⁶

Wisconsin prohibited bargaining over all subjects except increases to base wages, which expressly excludes overtime, premium pay, merit pay, performance pay, supplemental pay, and pay progressions.⁷⁷ Furthermore, with respect to base wages, negotiated increases may not exceed the increase in the Consumer Price

68. US, SB 1108, 61st Legis, Reg Sess, Idaho, 2011, § 17.

69. *Ibid*, § 22. In states such as Idaho, where unions lack a right to strike or to go to interest arbitration, an evergreen clause can give a union some measure of bargaining power.

70. Idaho Secretary of State, Election Division, *November 6, 2012 General Election Results*, online: Proposition 1 <<http://www.sos.idaho.gov/>>.

71. US, SB 0575, 117th Gen Assem, Reg Sess, Ind, 2011, § 14 (codified at Ind Code Ann § 20-29-6-4).

72. *Ibid*, § 17 (codified at Ind Code Ann § 20-29-6-5).

73. *Ibid*, § 15 (codified at Ind Code Ann § 20-29-6-4.5).

74. *Ibid*, § 13 (codified at Ind Code Ann § 20-29-6-3).

75. *Ibid*, § 16 (codified at Ind Code Ann § 20-29-6-4.7(b)).

76. *Ibid*, § 6.

77. 2011 Wis Act 10, *supra* note 66, § 245 (codified at Wis Stat Ann § 111.70(4)(mb)).

Index (CPI) for the twelve-month period ending six months before contract expiration. Increases above the increase in the CPI are subject to a voter referendum.⁷⁸

Michigan added to its list of prohibited subjects of bargaining for education personnel by forbidding bargaining with respect to: placement of teachers; reductions in force and recalls; performance evaluation systems; the development, content, standards, procedures, adoption, and implementation of a policy regarding employee discharge or discipline; the format, timing, and number of classroom visits; the development, content, standards, procedures, adoption, and implementation of the method of employee compensation; decisions about how an employee performance evaluation is used to determine performance-based compensation; and the development, format, content, and procedures of notice to parents and legal guardians of pupils taught by a teacher who has been rated as ineffective.⁷⁹ At the insistence of the mayor of Chicago, Illinois also restricted teacher bargaining by making the lengths of the school year and school day permissive subjects of bargaining, thereby leaving them to unilateral management control.⁸⁰

The post-2010 backlash also intruded into employee rights to bargain with respect to core bread and butter issues. The most common intrusion was to strip employees of the right to bargain with respect to health care. In Wisconsin, although most law enforcement and some fire safety personnel were exempted from the general carnage wreaked on public employee bargaining rights, they saw the state's biannual budget act prohibit them from bargaining over health insurance.⁸¹ New Jersey has suspended bargaining over health care benefits for four years while a new statute is phased in. The statute sets a sliding scale

78. *Ibid.*, § 314 (codified at Wis Stat Ann § 111.91(3)). The Wisconsin enactment excluded most, but not all law enforcement personnel and some fire safety personnel, who continue to enjoy a broad range of bargaining rights. Federal courts rejected union claims that the distinction was based on which unions supported Governor Walker in the 2010 election and which supported his opponent and was, therefore unconstitutional. See *Wisconsin Education Association Council et al v Walker*, 824 F Supp (2d) 856, 192 LRRM 3299 (WD Wis 2012), *aff'd* in part 705 F (3d) 640, 194 LRRM 3110 (7th Cir 2013) [*WEAC*]. The Seventh Circuit affirmed Act 10's limitation on the scope of bargaining for general employees while not limiting it for public safety employees. However, the Seventh Circuit reversed the district court's holding that Act 10's disparate treatment with respect to dues check-off and annual certification was unconstitutional.

79. Mich PA 103 of 19 July 2011 (codified at Mich Comp Laws § 423.215(3)(j-p)).

80. US, SB 0007, 97th Gen Assem, Reg Sess, Ill, 2011, § 10 (codified at 115 Ill Comp Stat 5/4.5).

81. Wis Act 32 of 26 June 2011, § 2409(cy), 2011 Wis Sess Laws 501 (codified at Wis Stat Ann § 111.70(4)(mc)).

according to salary of mandatory employee contributions to health care premiums, and provides for health care plans to be designed by two state committees: one for education and one for the rest of the public sector.⁸²

Massachusetts enacted a new method for local governments to make changes in health insurance. The governing body may adopt changes in accordance with estimated cost savings and proof of the savings. It gives notice to each bargaining unit and a retiree representative. The retiree representative and the bargaining unit representatives form a public employee committee that negotiates with the employer for up to thirty days. After thirty days, the matter is submitted to a tripartite committee, which, within ten days, can approve the employer's proposed changes, reject them, or remand for additional information. The committee's decision is final.⁸³

Besides narrowing the areas in which employees and their unions may bargain, the post-2010 backlash strengthened the bargaining power of management. The Idaho enactment, since repealed by voter referendum, provided that if no agreement was reached by 10 June of a given year, the school board must unilaterally set the terms and conditions of employment for the coming school year by 22 June.⁸⁴ Thus, the employer had the power to "run out the clock" and act unilaterally. Tennessee's *CCA* has a similar provision.⁸⁵ New Jersey capped wage increases in police and firefighter interest arbitration awards at two per cent and prohibited interest arbitrators from issuing awards on economic matters that were not covered in the prior contract.⁸⁶ Nebraska specified how to select comparable communities in interest arbitration and decreed that no award could place the employee compensation at issue below 98 per cent or above 102 per cent of the average of the comparables.⁸⁷

The post-2010 backlash weakened unions by, among other things, making it more difficult for them to collect dues. Wisconsin prohibited state and local government employers from honouring voluntary worker requests to pay their union dues by payroll deduction, except for the favoured law enforcement and

82. NJ PL of 28 June 2011, c 78, online: <<http://www.state.nj.us/treasury/pensions/pdf/laws/chapt78-2011.pdf>>.

83. Act of 12 July 2011, c 69, 2011 Mass Legis Serv (West).

84. US, SB 1108, 61st Legis, Reg Sess, Idaho, 2011, § 20.

85. Tenn Code Ann, § 49-5-609(d) (2013).

86. NJ PL of 21 December 2010, c 105, online: <http://www.njleg.state.nj.us/2010/Bills/PL10/105_.PDF>.

87. US, LB 397, 102d Legis, Reg Sess, Neb, 2011, § 10, (codified at Neb Stat Ann 48-818(2)(j)(ii)).

fire safety personnel.⁸⁸ A federal district court found that the distinction between the favoured groups of employees and the vast majority of employees lacked any rational basis and was premised on the favoured unions' prior support for Governor Walker's election.⁸⁹ The court enjoined the prohibition as an unconstitutional denial of equal protection of the law, but the Court of Appeals for the Seventh Circuit reversed that holding.⁹⁰ Michigan enacted a similar prohibition on dues check-off for teachers,⁹¹ which a district court enjoined on equal protection and First Amendment grounds, only to be reserved by the Court of Appeals for the Sixth Circuit.⁹²

Although the post-2010 backlash has been more severe than the backlash of the 1990s, the two share a common trait. Both accept the basic legal structure that classifies matters as either mandatory subjects of bargaining (and therefore subject to traditional collective bargaining with its impasse resolution process), or subject to unilateral employer control. Their policy assumption is that collective bargaining impedes effective government and unilateral employer control will remedy that impediment. Instead of looking for avenues of employee voice that will challenge employees, through their unions, to take responsibility for the efficient delivery of public services and the craft, artistic, or professional aspects of their work, the backlash seeks to make employees obedient robots rather than smart and innovative workers. It is therefore not surprising that the Wisconsin backlash, for example, faced significant public employer opposition.⁹³

Experience shows that when employers and unions break the mould and engage each other with respect to the delivery of public services, the union's role is transformed and all parties benefit. For example, where school district management

88. 2011 Wis Act 10, *supra* note 66, §§ 58, 227, 298 (codified at Wis Stat Ann §§ 20.921(1)(a), 111.70(3g), 111.845).

89. *WEAC*, *supra* note 78.

90. *Ibid.*

91. Mich PA 53 of 16 March 2012 (codified at Mich Comp Laws § 423.210).

92. *Bailey v Callaghan*, Case No 12-cv-11504 (ED Mich 11 June 2012), *rev'd* 715 F (3d) 965 (6th Cir 2013).

93. The Wisconsin Association of School Boards reported that many of its members were "gravely concerned" that the bill would "immeasurably harm the collaborative relationships that exist between school boards and teachers." See letter from John H Ashley, Executive Director, Wisconsin Association of School Boards to Honorable Alberta Darling & Honorable Robin Vos, Co-chairs, Wisconsin Legislature Joint Committee on Finance (15 February 2011) [copy on file with author]. Hundreds of local government officials in Wisconsin signed an open letter to the governor opposing the bill on similar grounds. See Erin Richards, Amy Hetzner & Tom Tolan, "Clash Continues: Budget Battle: Day 12 Many City Officials Think Union Limits Go Too Far" *Milwaukee Journal Sentinel* (27 Feb 2011).

unilaterally develops and implements teacher evaluation standards, it is not surprising that teacher unions do everything in their power to protect their members from management's actions. But when teachers, through their unions, play a role in developing and implementing evaluation standards, as they do in those school districts that have adopted peer review, the union's role changes from protecting the irremediably incompetent to protecting the professional standards it helped to develop.⁹⁴ In spite of hostile legal doctrine, examples abound of the positive impact of worker voice in the public sector enterprise.⁹⁵

Studies find that the most productive workplaces are unionized workplaces with high levels of employee involvement. Sandra Black and Lisa Lynch simulated a base case of a non-union manufacturer with little employee involvement. They found that unionized firms with little employee involvement had productivity levels 15 per cent lower than the base case. Non-unionized firms with high employee involvement had productivity levels 10.6 per cent higher than the base case, but "adding unionization to this already high-performance workplace is associated with an impressive 20% increase in labor productivity."⁹⁶ Black and Lynch then examined the actual mean characteristics of unionized and non-unionized firms in a sample of manufacturers with high levels of employee involvement. They found that the unionized firms' productivity averaged 16 per cent higher than the base case, while the non-unionized firms' productivity averaged 11 per cent lower than the base case.⁹⁷

The challenge for US public sector labour law reform is not to render workers and their unions powerless to clear the way for unilateral employer control. Rather, the challenge is to expand worker voice, thereby empowering workers and their unions as agents for improving the delivery of public services.

94. See Malin & Kerchner, *supra* note 5 at 904-06.

95. See e.g. David Lewin et al, "Getting It Right: Empirical Evidence and Policy Implications from Research on Public Sector Unionism and Collective Bargaining" (Employment Policy Research Network & Labor and Employment Relations Association, 7 March 2011) at 16-22, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1792942>. See also Bob Hebdon & Peter Warrian, "Coercive Bargaining: Public Sector Restructuring under the Ontario Social Contract, 1993-1996" (1999) 52:2 *Indus & Lab Rel Rev* 196. The authors found that superior outcomes were achieved under the *Ontario Social Contract Act's* economic restructuring, where workers were able to voice their concerns through collective bargaining.

96. Sandra E Black & Lisa M Lynch, "The New Workplace: What Does It Mean for Productivity?" (Paper delivered at the Fiftieth Annual Meeting of the Industrial Relations Research Association, 3-5 January 1998), in Paul B Voos, ed, *Proceedings of the Fiftieth Annual Meeting, Volume 1* (Industrial Relations Research Association, 1998) 60 at 65.

97. *Ibid.*

Part II looks to what, at first glance, may seem an improbable source of ideas for such reform, the evolving jurisprudence under Canada's *Charter*.

II. THE *CHARTER*, THE CONSTITUTION AND US LABOUR LAW

In *Dunmore v Ontario*, the SCC held that Ontario's repeal of its *Agricultural Labour Relations Act*, which reinstated the exclusion of agricultural workers from the *Ontario Labour Relations Act (OLRA)* and left those workers with no statutory protection for organizing a union, violated section 2(d) of the *Charter's* guarantee of freedom of association and was not justified under section 1.⁹⁸ Justice Bastarache reasoned that section 2(d) protects not only the freedom of individuals to associate, but in some circumstances, the freedom of the collective. He further reasoned that under some circumstances, the legislative exclusion of a group of individuals from a protective regime may violate section 2(d). He summarized the reasoning:

[T]he activities for which the appellants seek protection fall squarely within the freedom to organize, that is, the freedom to collectively embody the interests of individual workers. Insofar as the appellants seek to establish and maintain an association of employees, there can be no question that their claim falls within the protected ambit of s. 2(d) of the *Charter*. Moreover, the effective exercise of these freedoms may require not only the exercise in association of the constitutional rights and freedoms (such as freedom of assembly) and lawful rights of individuals, but the exercise of certain collective activities, such as making majority representations to one's employer. These activities are guaranteed by the purpose of s. 2(d), which is to promote the realization of individual potential through relations with others, and by international labour jurisprudence, which recognizes the inevitably collective nature of the freedom to organize. Finally, while inclusion in legislation designed to protect such freedoms will normally be the province of s. 15(1) of the *Charter*, claims for inclusion may, in rare cases, be cognizable under the fundamental freedoms.⁹⁹

Applying this reasoning to the exclusion of agricultural workers from the *OLRA*, Justice Bastarache concluded that "the inherent difficulties of organizing farm workers, combined with the threats of economic reprisal from employers," together with the exclusion's effect of sending a message that agricultural worker organizing was not legitimate, infringed on freedom of association.¹⁰⁰ After concluding that the infringement was not justified under section 1 of the *Charter*, the SCC suspended the judgment of invalidity for eighteen months

98. *Dunmore*, *supra* note 6.

99. *Ibid* at para 30.

100. *Ibid* at para 48.

to give the legislature an opportunity to react. Justice Bastarache opined that at a minimum, agricultural workers must be given statutory freedom to organize

along with protections judged essential to its meaningful exercise, such as freedom to assemble, to participate in the lawful activities of the association and to make representations, and the right to be free from interference, coercion and discrimination in the exercise of these freedoms.¹⁰¹

In *Health Services & Support Facilities Subsector Bargaining Association v British Columbia*, the SCC held that “the s. 2(d) guarantee of freedom of association protects the capacity of members of labour unions to engage in collective bargaining on workplace issues.”¹⁰² The SCC invalidated portions of BC’s *Health and Social Services Delivery Improvement Act* that superseded collective agreement provisions that restricted health sector employers from contracting out of non-clinical services, prohibited future collective agreements from restricting such contracting-out, and, for a specified period of time, superseded collective agreement provisions restricting layoffs and providing greater notice and bumping rights than existed under statutory regulations.¹⁰³ The court elaborated:

We conclude that s. 2(d) of the *Charter* protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of “collective bargaining”, as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute, or guarantee access to any particular statutory regime. What is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals.¹⁰⁴

Central to the right to bargain collectively, according to the SCC, is “the right of employees to have their views heard in the context of a meaningful process of consultation and discussion.”¹⁰⁵ Recognizing that one key to a meaningful process is the good faith of both parties, the court quoted the International Labour Organization’s *Declaration of Fundamental Principles of Rights at Work*:

The principle of good faith in collective bargaining implies recognizing representative organizations, endeavouring to reach an agreement, engaging in genuine and constructive negotiations, avoiding unjustified delays in negotiation and mutually

101. *Ibid* at para 67.

102. *BC Health*, *supra* note 6 at para 2.

103. The SCC also upheld restrictions on transfers and reassignment provisions in collective agreements and changes in the employees’ status following contracting out.

104. *BC Health*, *supra* note 6 at para 19.

105. *Ibid* at para 114.

respecting the commitments entered into, taking into account the results of negotiations in good faith.¹⁰⁶

In *Fraser*, the SCC considered the validity under the *Charter* of the *Ontario Agricultural Employees Protection Act (AEPA)*, enacted in response to *Dunmore*. The *AEPA* granted agricultural employees the rights to form, join, and participate in employee associations; to assemble; and to make representations, orally or in writing, to their employers concerning terms and conditions of employment. It imposed a duty on employers to listen to the representations and, when representations are made in writing, to read them and to provide a written acknowledgement that it has read them. The SCC interpreted the *AEPA* as imposing on employers a duty to consider employee representations in good faith. So interpreted, the SCC held that the *AEPA* was consistent with section 2(d) of the *Charter*. Rejecting the holding of the lower court that section 2(d) guarantees a right to a *Wagner Act* system of collective bargaining, the SCC found the *AEPA* consistent with the holding of *BC Health*, which it characterized as follows:

Health Services affirms a derivative right to collective bargaining, understood in the sense of a process that allows employees to make representations and have them considered in good faith by employers, who in turn must engage in a process of meaningful discussion. The logic that compels this conclusion, following settled *Charter* jurisprudence, is that the effect of denying these rights is to render the associational process effectively useless and hence to substantially impair the exercise of the associational rights guaranteed by s. 2(d). No particular bargaining model is required.¹⁰⁷

The jurisprudence in the United States is the polar opposite to the jurisprudence in Canada. The *Smith* case involved a challenge to the Arkansas State Highway Department's policy that it would consider grievances only when filed by the aggrieved employee alone, and would not consider grievances filed on the employee's behalf by his or her union. Lower courts held that this refusal violated the employee's rights under the First Amendment, but the US Supreme Court summarily reversed, not even giving the parties an opportunity to brief and argue the case. The Court declared:

[T]he First Amendment is not a substitute for the national labor relations laws... . [T]he fact that procedures followed by a public employer in bypassing the union and dealing directly with its members might well be unfair labor practices were federal statutory law applicable hardly establishes that such procedures violate the Constitution... . [T]he First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association

106. *Ibid* at para 98.

107. *Fraser*, *supra* note 6 at para 54.

and bargain with it... . Far from taking steps to prohibit or discourage union membership or association, all that the Commission has done in its challenged conduct is simply to ignore the union. That it is free to do.¹⁰⁸

Why such opposite results north and south of the border? One explanation is the different status of the right to free association, which under the *Charter* is an express right, but under the US *Constitution* is inferred from the right of free speech. I suggest, however, that with respect to a right of collective representation, the more relevant distinction between the two countries lies in their different approaches to property rights.

Historically and culturally, the two countries have approached the role of property differently. The United States was born from a revolution against England, and that revolutionary spirit has carried forward in the form of a distrust of state authority. The United States largely lacked a landed aristocracy but had what seemed to be a limitless frontier and limitless opportunities. These factors account for the development of a sense of risk taking and entrepreneurship, as well as strong Lockean values with respect to property, in which property ownership is viewed as derived from an individual's natural labour rather than inheritance or a grant from the state, and should be protected against state interference. Furthermore, because property is regarded as individually earned, its ownership is not accompanied with much sense of obligation to workers or society.¹⁰⁹

In contrast, Canada has had a history of elite development and corporate rule, primarily with large fur trading and grain companies and the state. These elites were more accepting of a sense of obligation, paternalism, and a softer conception of property rights.¹¹⁰ Furthermore, historically in Canada the government retained control over the natural resources present on the land, even when the land became privately owned, in contrast to the United States where property ownership was largely unrestricted.¹¹¹

The US *Constitution* guarantees that no person may be deprived of life, liberty, or property without due process of law.¹¹² In contrast, the *Charter* protects against deprivation of life, liberty, or security of person, except in accordance with principles of fundamental justice.¹¹³ The *Charter's* omission of express protection

108. *Smith*, *supra* note 7 at 464-66.

109. See e.g. John Godard, "The Exceptional Decline of the American Labor Movement" (2009) 63:1 *Indus & Lab Rel Rev* 82 at 84-86.

110. *Ibid.*

111. See Roy Vogt, *Whose Property? The Deepening Conflict between Private Property and Democracy in Canada* (Toronto: University of Toronto Press, 1999) at 2-30.

112. US Const amends V, XIV, § 1.

113. *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being

for property rights was deliberate. It reflected concern that protection against deprivation of property without due process could be interpreted more broadly than providing procedural protection. Looking to the experience in the United States, opponents of express protection for property rights feared that courts might interpret the inclusion of property in the *Charter's* due process provision as a license to invalidate economic regulation and disturb the recognition of democratic will over property rights that had evolved in Canada.¹¹⁴ The exclusion of property rights from the *Charter* was reaffirmed despite efforts led by Conservative Prime Minister Brian Mulroney to incorporate them—an amendment to that effect was excluded from the Charlottetown Accord in 1992.¹¹⁵

The differences between the two countries' approaches to property rights are particularly significant with respect to their approaches to labour law.¹¹⁶ In the United States, property rights drive the interpretation of the *NLRA*. As far back as 1956, the US Supreme Court held that under most circumstances, the *NLRA* does not forbid an employer from prohibiting a union organizer,

Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

114. See Alexander Alvaro, "Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms" (1991) 24:2 Can J Pol Sci 309. See also Seymour Martin Lipset, *Continental Divide: The Values and Institutions of the United States and Canada* (New York, NY: Routledge, 1990) at 103.

115. Vogt, *supra* note 111 at 50-51.

116. Of course, there are many other historical and cultural differences between the two countries that contribute to the different fortunes of unions north and south of the border. For example, in the United States, an emphasis on competitive individualism was inconsistent with a sense of class-consciousness. Although there was a surge in class-consciousness during the Great Depression of the 1930s, it largely dissipated with the economic boom after World War II. In Canada, however, a greater sense that individuals do not completely control their stations in life supports a stronger class-consciousness. Similarly, early US labour leaders focused on improving the economic situations of their members through collective bargaining, whereas Canadian unions were more politically involved and played a major role in the establishment of the New Democratic Party. Lipset, *supra* note 114 at 164-71. I do not intend to devalue these differences. Rather, my point is that the differences between the two countries' approaches to property rights accounts for much of the difference in their labour law doctrines. Indeed, the justification given in the United States for the *Wagner Act's* statutory protection for the right to organize and bargain collectively was instrumentalist. It focused on removing impediments to commerce, equalizing bargaining power to stimulate the economy through improved worker incomes and spending, and providing a freedom of contract alternative to direct government intervention setting terms and conditions of employment. In contrast, the justification given for Canadian labour laws focused on worker rights and maintaining balance in industry as ends in themselves. As Godard has observed, "A labor rights discourse at odds with the freedom of contract and economic gain could be seen as a challenge to property rights, and would not have resonated with U.S. traditions, institutional norms, or ultimately, Supreme Court doctrine." See Godard, *supra* note 109 at 91.

not employed by the employer, from soliciting employees on the employer's premises. The Court declared:

Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other.¹¹⁷

In 1992, the Court reaffirmed the rule that an employer may in most instances bar from its premises organizers who are not its employees. The court again emphasized the primacy of employer property rights, characterizing the union's claim of a right to enter employer property to solicit employees as a claim of a right to trespass.¹¹⁸

Unlike Canadian labour law, which, at least in the private sector, mandates bargaining on all subjects related to terms and conditions of employment,¹¹⁹ the *NLRA* limits the mandate. This limitation is based on recognition that some matters, although directly affecting job security or other conditions of employment, lie at the heart of entrepreneurial control. Compelling bargaining on these matters would intrude on employer unilateralism—that is, on employer control over what an employer may do with its property. The US Supreme Court has explained the rationale:

In establishing what issues must be submitted to the process of bargaining, Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed. Despite the deliberate openendedness of the statutory language, there is an undeniable limit to the subjects about which bargaining must take place.¹²⁰

The judicial gloss limiting the subjects of bargaining is thus designed to protect employer control over its own property. So understood, it follows that if a subject is not mandatorily negotiable, it is left to complete unilateral employer control.

The different approaches to property rights may justify dismissing the evolving

117. *National Labor Relations Board v Babcock & Wilcox Co*, 351 US 105 at 112, 76 S Ct 679 (1956) [*Babcock & Wilcox*].

118. *Lechmere, Inc v National Labor Relations Board*, 502 US 527, 112 S Ct 841 (1992) [*Lechmere*].

119. The scope of bargaining is narrower in the Canadian public sector. See Mark Thompson & Patrice Jalette, "Public-Sector Collective Bargaining" in Morley Gunderson & Daphne Taras, eds, *Canadian Labour and Employment Relations*, 6th ed (Toronto: Pearson Addison Wesley, 2009) 403 at 414-16.

120. *First National Maintenance*, *supra* note 4 at 676.

jurisprudence under the *Charter* when considering private sector labour law in the United States, but the same may not be said with respect to the US public sector. Public employers do not have private property rights—their premises are public property. Several labour relations boards have recognized this critical difference and have opined that the *Babcock & Wilcox/Lechmere*¹²¹ approach to protecting private employers' property rights does not apply in the public sector.¹²²

Moreover, the *NLRA* is premised on, among other things, a congressional finding of a need to equalize bargaining power between employees and unions—that is, a need to place limits on otherwise unlimited employer property rights. In contrast, most public sector labour relations acts are premised on legislative findings that collective bargaining is in the public interest. For example, New York's *Taylor Law* declares it to be

the public policy of the state and the purpose of this act to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government.¹²³

Similarly, the Illinois *Public Labor Relations Act* declares that its purpose is “to prescribe the legitimate rights of both public employees and public employers, to protect the public health and safety of the citizens of Illinois, and to provide peaceful and orderly procedures for protection of the rights of all.”¹²⁴ The Nebraska Supreme Court observed that its public sector labour relations act was “not only an attempt to level the employment playing field, but also ... a mechanism designed to protect the citizens of Nebraska from the effects and consequences of labor strife in public sector employment.”¹²⁵

The differences between the public and private sectors in the United States suggest that the evolving jurisprudence under the *Charter* should not be dismissed out of hand in considering public sector labour law. Although it is

121. *Babcock & Wilcox*, *supra* note 117; *Lechmere*, *supra* note 118.

122. See e.g. *Service Employees International Union, Local 721 v County of Riverside*, 36 PERC ¶ 113 at 453 (Cal Pub Emp Rel Bd 2012); *California Correctional Officers Association v California Department of Corrections*, 4 PERC ¶ 11079 at 325 (Cal Pub Emp Rel Bd 1980); *Service Employees International Union, Local 73 v Palatine Community Consolidated School District No 15*, 18 PERI ¶ 1043 (Ill Educ Lab Rel Bd 2002); *District 1199W/United Professionals for Quality Health Care, SEIU, AFL-CIO, CLC v University of Wisconsin Hospitals and Clinics Authority*, Dec No 30202-C (Wis Emp Rel Comm 2004).

123. NY Civ Serv § 200 (2013).

124. 5 Ill Comp Stat 315/2 (2013).

125. *Omaha Police Union Local 101 v City of Omaha*, 736 NW (2d) 375 at 384, 182 LRRM 2538 (Neb Sup Ct 2007).

highly unlikely that the US Supreme Court would adopt the approach in *Fraser* in the foreseeable future, the evolving jurisprudence can provide an alternative to the legislative backlash in the search for avenues of public sector labour law reform. Part III considers the possibilities.

III. THE *CHARTER* AS A GUIDE FOR US PUBLIC SECTOR LABOUR LAW REFORM

Part I showed that US public sector labour law has adhered to the *NLRA* model, particularly with respect to subjects of bargaining. Under the *NLRA* in the US public sector, matters are characterized as mandatory subjects of bargaining with full *NLRA*-style collective bargaining rights, with either a modified right to strike, a right to proceed to interest arbitration, or a right to proceed to fact-finding. Alternatively, matters are left to unilateral employer control with no worker right to voice in employer decision making. Political backlash against public sector labour unions has led to increased employer control by stripping employees of any right to organize and bargain collectively, narrowing the subjects of bargaining and increasing employer power in the bargaining process while decreasing union strength. Such marginalization of worker voice, however, is likely to be self-defeating because the most constructive and effective delivery of public services occurs where workers have a voice in basic decision making.

The SCC's decision in *Fraser* has inspired a wide range of diverse scholarly commentary.¹²⁶ My purpose is not to join that debate, but instead to look to the evolving jurisprudence under section 2(d) of the *Charter* to inspire a search in the US public sector for alternatives to the *NLRA* model. The SCC recognized in *Fraser* that the right to freedom of association does not equate to a right to an *NLRA*-like model process. However, it does equate to a right to a process that permits meaningful pursuit of collective workplace goals.

The decision in *Fraser* is ambiguous. It is not clear what the SCC means

126. For example, scholars have differed over the appropriateness of looking to international law to inform the evolving jurisprudence on freedom of association. See Kevin Banks, "The Role and Promise of International Law in Canada's New Labour Law Constitutionalism" (2011) 16 CLEJ 233. Compare Brian Langille & Benjamin Oliphant, "From the Frying Pan into the Fire: *Fraser* and the Shift from International Law to International 'Thought' in *Charter* Cases" (2011) 16 CLEJ 181. Scholars have also differed over whether the SCC improperly confused freedoms with rights. See Brian Langille, "Why the Right-Freedom Distinction Matters to Labour Lawyers – And to All Canadians" (2011) 34 Dal LJ 143. Compare Alan Bogg & Keith Ewing, "A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada" (2012) 33 Comp Lab L & Pol'y J 379.

when it speaks of agricultural employers' duty to consider employee associations' representations in good faith. It is unclear both whether that duty includes a duty to engage in dialogue with employee associations over their representations, and whether it includes a duty to provide notice and an opportunity to be heard before taking employer-initiated action.¹²⁷

Union attorney Steven Barrett argues that there can be no effective collective bargaining without a regime of exclusivity and a formal dispute resolution system.¹²⁸ He maintains that in light of the

lived experience, history and social and economic background of agricultural workers ... no one could credibly suggest that a duty to consider employee representations in good faith, and that alone, is sufficient to result in meaningful collective bargaining, as it is understood in Canada and internationally.¹²⁹

My purpose is not to evaluate the *AEPA*. Rather, I argue that freedom of association as developed in *Fraser* can provide a useful alternative to US public sector labour law, which characterizes disputes between employees and their employer as either involving mandatory subjects of bargaining or as left to unilateral employer control.

In *Fraser*, the majority defended and applied the decision in *BC Health*. As quoted previously, the majority spoke of a process that includes meaningful discussion and of ensuring that associational rights are not substantially impaired by rendering the associational process effectively useless.¹³⁰ As I read *Fraser*, there cannot be good-faith consideration of employee representations without meaningful discussion with the employees' association. Furthermore, where there is an established employee representative, a statutory regime that enables an employer to act unilaterally, without providing the representative notice and an opportunity to make representations and to engage in meaningful discussion, effectively renders worker associational activity meaningless. It is this understanding of *Fraser* that I shall apply to the question of US public sector labour law reform.

The post-2010 backlash in the United States, as well as the backlash of the 1990s, approached public sector labour law reform as a question of what to do with the workers' exclusive bargaining representative. The backlash answered

127. *Ibid* at 384-88. See also Judy Fudge, "Constitutional Rights, Collective Bargaining and the Supreme Court of Canada: Retreat and Reversal in the *Fraser* Case" (2012) 41:1 *Indus LJ* 1 at 23-24.

128. Steven Barrett, "The Supreme Court of Canada's Decision in *Fraser*: Stepping Forward, Backward or Sideways?" (2012) 16 *CLEJ* 331.

129. *Ibid* at 332-33.

130. See text accompanying note 105.

this question by eliminating the exclusive representative (which it accomplished by repealing bargaining rights), by limiting its sphere of influence (which it accomplished by narrowing subjects of bargaining), and by weakening it within that sphere while strengthening employer power. These changes simply channel unions into doing whatever they can to protect their members from the consequences of decisions imposed unilaterally by their employers. Such an approach is not sustainable over the long term, as it channels worker voice in ways that are not likely to contribute to the effective delivery of public services.

Once we recognize that there are alternatives to the *NLRA* model of worker representation, we can look to the evolving jurisprudence under the *Charter* to suggest avenues for expanding the range of subjects on which workers' voice is legally protected. Such a public sector labour law regime must avoid measures that render worker associational activity meaningless and must employ measures that provide for meaningful discussion of worker representations.

The presentation of decisions that significantly impact workers' workplace lives as *faits accomplis* renders workers' associational activities meaningless. Critical to any reform that broadens the subjects on which workers have a voice is a requirement of advance notice and an opportunity for pre-decisional involvement. President Obama recognized the critical importance of such notice and opportunity to be heard when he issued an executive order for the establishment of labour-management forums in each department and agency of the executive branch. A key purpose of those forums was to

allow employees and their union representatives to have pre-decisional involvement in all workplace matters to the fullest extent practicable, without regard to whether those matters are negotiable subjects of bargaining under 5 U.S.C. 7106; provide adequate information on such matters expeditiously to union representatives where not prohibited by law; and make a good-faith attempt to resolve issues concerning proposed changes in conditions of employment, including those involving the subjects set forth in 5 U.S.C. 7106(b)(1), through discussions in its labor-management forums ...¹³¹

Notice and an opportunity for pre-decisional involvement are necessary but not sufficient to afford workers, through their unions, an opportunity to make representations and to have those representations considered through good-faith dialogue. The Obama executive order recognizes a need to exchange adequate information on the matter at issue. A failure to supply relevant information creates

131. Creating Labor-Management Forums to Improve Delivery of Government Services, Exec Order No 13522 (9 December 2009), online: <<http://www.whitehouse.gov/the-press-office/executive-order-creating-labor-management-forums-improve-delivery-government-service>>.

a high risk of rendering worker associational activity meaningless. Without adequate information, workers and their unions are in no position to make representations to their employers, and it is difficult to see how a good-faith dialogue can occur in an information vacuum. The exchange of information facilitates good-faith dialogue because it engenders trust and allows the exploration of mutually beneficial solutions.¹³² Any right to engage in meaningful dialogue must include a duty to exchange relevant information.

The ongoing debate in the United States is focused on the role of the exclusive bargaining representative in the public sector. The backlash of the 1990s and post-2010 elections has sought to confine that role to a narrow range of subjects of bargaining and, within that narrow range, weaken the union's power while strengthening the employer's. The focus here is on expanding that role and transforming it, by breaking the *NLRA* mould that divides issues into matters that are subject to the full range of traditional collective bargaining rights and all others, which are left to unilateral employer control. For such an expansion to be meaningful and effective, the right to represent the workers must remain with their exclusive bargaining representative. Bypassing the union to negotiate directly with individual employees, or even groups of employees not authorized by the exclusive representative, must be a per se indicator of bad faith, as it is under traditional labour law with respect to mandatory subjects of bargaining.

Minnesota has recognized this in its statute that provides for an expanded role for worker voice. Minnesota requires public employers to "meet and confer," but not negotiate, with representatives of their professional employees with respect to matters affecting the workplace that are not mandatory subjects of bargaining.¹³³ Where the employees are represented by an exclusive bargaining representative, the meet and confer sessions must be undertaken with that representative, and may not be undertaken with other employees or other employee groups.¹³⁴ The US Supreme Court has upheld the constitutionality of the restriction of the meet and confer requirement to the exclusive bargaining representative, even though such restriction may effectively freeze out of the process members of the bargaining unit who are not members of the union.¹³⁵

132. See Kenneth G Dau-Schmidt, "A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace" (1992) 91 Mich L Rev 419 at 499-500.

133. Minn Stat Ann § 179A.07(3) (2012).

134. *Ibid*, § 179A.07(4).

135. *Minnesota State Board for Community Colleges v Knight*, 465 US 271, 104 S Ct 1058 (1984).

The points made in the preceding paragraphs can be restated as three elements necessary for any reforms that serve as alternatives to the *NLRA* model and provide vehicles for worker voice in areas that are currently reserved to unilateral employer control. These three elements, which may be regarded as objective rules of participation in the process, are advance notice and opportunity for participation before a decision is made, exchange of relevant information, and non-circumvention of the exclusive representative. These objective rules may lead parties to the waters of good-faith cooperative decision making, but they cannot by themselves make the parties “drink.” The critical question is how to enforce a general duty to engage the other party in subjective good faith.

Under the *NLRA*, courts and the NLRB are loath to evaluate positions taken in bargaining for signs of subjective bad faith. This is because of the *NLRA*’s embrace of the principle of freedom of contract, an embrace driven by respect for employer property rights. Although a purpose of the *NLRA* was to equalize bargaining power, it does not mandate equal bargaining power: “It cannot be said that the Act forbids an employer or a union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining.”¹³⁶ A party does not breach its duty to bargain in good faith under the *NLRA* when it responds to the other party’s proposal by saying, “I won’t agree to that because I don’t want to and you don’t have the power to make me.” The dispute among authorities over whether to rely on parties’ positions at the bargaining table as evidence of subjective bad faith is a dispute between the options of rarely and never doing so.¹³⁷

As discussed previously, however, concern for employer private property rights has no role where the employer is a unit of government. Furthermore, the purpose for mandating good-faith engagement between public employers and the unions representing their employees on a broad range of matters is recognition that such a process has a reasonable chance of producing outcomes that are better for employees, employers, and the public at large. In these circumstances, “I won’t agree because you can’t make me” is an unacceptable answer and should be considered strong evidence of subjective bad faith.

When employees, through their unions, make representations to employers, employers must offer their reasons for declining the unions’ proposals. Providing such reasons facilitates further engagement by inviting the union to refine its

136. *HK Porter*, *supra* note 21 at 109.

137. For example, compare the majority and concurring opinions in *Hardesty Company, Inc d/b/a Mid-Continent Concrete*, 336 NLRB 258, 171 LRRM 1016 (2001), *enf’d* 308 F (3d) 859, 171 LRRM 2006 (8th Cir 2002).

proposals and can lead to cooperative discussions about mutual and competing interests. There is limited precedent for such an approach in US law.

Under the *Federal Service Labor-Management Relations Statute*, which governs relations between federal government agencies and unions representing their employees, where no union has exclusive bargaining rights on an agency-wide basis, a union that is the exclusive representative of a substantial number of agency employees is entitled to national consultation rights.¹³⁸ Although the agency is not obligated to bargain on a national basis, it must give the union notice of proposed substantive changes in conditions of employment, afford the union an opportunity to present its views and recommendations, consider those representations, and provide the union with a statement of reasons for any action it takes.¹³⁹ “We won’t do it because you can’t make us,” again, is not an acceptable response.

The *Americans with Disabilities Act (ADA)* imposes on employers a duty to reasonably accommodate employees with disabilities, so long as the accommodation does not pose an undue hardship for the employer.¹⁴⁰ *Equal Employment Opportunity Commission (EEOC)* regulations provide that in determining appropriate accommodations, an interactive process between employer and employee may be necessary.¹⁴¹ *EEOC* interpretive guidance suggests that an interactive process is mandatory.¹⁴² Although the US Courts of Appeals are divided over whether the *ADA* requires an interactive process,¹⁴³ those that find such a requirement examine the substantive interactions between the parties to determine whether the requirement has been met. As explained by the Court of Appeals for the Seventh Circuit:

[I]f an employee has requested an appropriate accommodation, the employer may not simply reject it without offering other suggestions or at least expressing a willingness to continue discussing possible accommodations. This reflects the give-and-take aspect of the interactive process. An employer cannot sit behind a closed door and reject the employee’s requests for accommodation without explaining why the requests have been rejected or offering alternatives.¹⁴⁴

138. 5 USC § 7112(a) (2012).

139. *Ibid.*, § 7113(b).

140. 42 USC § 12112(b)(5)(A) (2012). I am grateful to Professor Matthew Finkin for suggesting this analogy.

141. 29 CFR 1630.2(o)(3) (2012).

142. *Ibid.*, § 1630 app.

143. See generally John R Autry, “Reasonable Accommodation under the ADA: Are Employers Required to Participate in the Interactive Process? The Courts Say ‘Yes’ but the Law Says ‘No’” (2004) 79 Chicago-Kent L Rev 665.

144. *Equal Employment Opportunity Commission v Sears, Roebuck & Co.*, 417 F (3d) 789 at 806, 2005 US App LEXIS 16707 (7th Cir).

Traditional collective bargaining, coupled with a right to resort to economic weapons or to proceed to interest arbitration in the event of an impasse, facilitates the current laissez-faire approach to regulating conduct at the bargaining table. In a right-to-strike regime, when a union complains of excessively harsh employer proposals, the legal response to the union is, in effect, “If you don’t like it, go out on strike, and if you lack the power to strike, then you have to accept the best deal that your weak bargaining power will get you.” Similarly, when a party complains of another party’s excessively harsh proposals in an interest arbitration regime, the legal response is, in effect, “If you don’t like it, take your chances with an arbitrator.” Where, however, the right to strike or to go to interest arbitration is not available as a vehicle to police good faith in bargaining without regulatory intervention, there is precedent for more active intervention. In *Municipality of Metropolitan Seattle v Public Employment Relations Commission*, the Washington Supreme Court upheld the authority of the Washington Public Employment Relations Commission to order the employer to bargain in good faith, and if negotiations and mediation did not produce agreement, to submit to interest arbitration even though the statute did not provide the employees at issue with a right to interest arbitration.¹⁴⁵ The court found the order appropriate in light of the employer’s repeated breaches of its duty to bargain in good faith. It distinguished cases decided under the *NLRA* on the ground that under the Washington public employee collective bargaining statute, the employees lacked the right to strike enjoyed by their private sector counterparts.

The above analysis does not provide a magic formula for crafting reforms that expand the scope of workers’ rights to a voice in workplace decision making through alternatives to *NLRA*-style collective bargaining. However, it does provide a framework for evaluation of specific reforms. Recent reforms from Tennessee and Illinois illustrate this.

As discussed in Part I, Tennessee replaced its teacher collective bargaining law with the *CCA*. At first glance, the *CCA* appears to be an innovative approach to employee voice, providing for proportional representation and interest-based problem solving. A second look at the statute is not as favourable. The statute expressly declares that the parties are not required to reach agreement and provides that if no agreement is reached, the school board sets employee terms and conditions of employment by board policy.¹⁴⁶ There is no incentive for the employer to do anything but run out the clock and impose terms. The *CCA* also appears to expressly authorize the director of schools to bypass the employees’

145. 826 P (2d) 158, 118 Wn (2d) 621 (1992).

146. Tenn Code Ann § 49-5-609(d) (2013).

representatives and deal directly with individual employees.¹⁴⁷ Most significantly, the Tennessee statute expressly prohibits collaborative conferencing with respect to differential pay plans and incentive compensation, expenditure of grants or awards, evaluations, staffing decisions, personnel decisions concerning assignment of professional employees, and payroll deductions for political activities.¹⁴⁸ The prohibition strongly suggests that the statute's true purpose is to erect a sham that gives an illusion of collective representation without the reality.

In January 2010, Illinois enacted the *Performance Evaluation Reform Act (PERA)*.¹⁴⁹ *PERA* requires school districts to incorporate in their teacher evaluation plans indicators of student growth as a significant factor in evaluating teacher performance. The decision as to how to do so must be made by a committee consisting of equal numbers appointed by the school district and the teachers and their union. *PERA* makes it clear that the use of student growth in teacher evaluations is not a mandatory subject of bargaining. In place of traditional bargaining, *PERA* calls for a cooperative effort by school districts and their teachers, but provides that if the joint committee is unable to agree on a plan after 180 days, the school district must adopt a default plan developed by the Illinois State Board of Education.¹⁵⁰

In 2011, a lengthy series of meetings led by the Chair of the State Senate Special Committee on Education Reform involving the major teacher unions, school board and school administrator associations, and business and community groups resulted in reform legislation enacted by the state legislature and signed by the governor. The *PERA* model was used in part for reform of the process for laying off teachers during a reduction in force. The new statute replaces seniority and licensure as the sole determinants of order of layoff. Performance evaluations are the primary criterion and seniority is relegated to determining the order of layoff of teachers in the two highest performance-rating categories.¹⁵¹ However, the reform law follows the *PERA* model by requiring each school district to establish a joint labour-management committee. The committee may, by majority vote, provide for teachers who would otherwise be grouped in the second lowest performance classification to be moved into the next higher

147. *Ibid.*, § 49-5-608(c).

148. *Ibid.*, § 49-5-608(b).

149. Ill PA 96-0861 of 15 January 2010, online: <<http://www.ilga.gov/legislation/publicacts/96/PDF/096-0861.pdf>>.

150. 105 Ill Comp Stat 5/24A-4(b) (2013). *PERA* makes an exception for the Chicago Public Schools, allowing the Chicago School Board to implement its last best offer if the joint committee is unable to reach agreement. (*Ibid.*, 5-24A-4(c).

151. *Ibid.*, 5/24-12(b).

classification. The committee may also, by majority vote, modify the criteria for the highest performance grouping. Members of the committee also serve as watchdogs against school district manipulation of evaluations to lay off the most senior, and hence the most highly paid, teachers. If committee members, in good faith, believe that there is a pattern of senior faculty receiving performance evaluations lower than their prior ones, they may receive and review relevant data from the district and issue a report to the district and the union.¹⁵²

Under both Illinois acts, the joint labour-management committee is designed to work cooperatively on matters of common concern. If it does not reach agreement or consensus, the result is not a strike, an interest arbitration, or an assertion of power through employer unilateral implementation followed by challenge to that power via union-filed unfair labour practice charges. Rather, the result is that the matter is governed by default rules established by the state. The desire to avoid being governed by state default rules provides considerable incentive for good-faith collaboration. The Illinois statutes stand in marked contrast to the Tennessee *CCA*.

IV. CONCLUSION

The United States has seen a strong backlash that has sharply reduced worker voice in public sector employment. Viewing public sector collective bargaining as bad for the public and as an impediment to innovation, many states increased employer authority and power to act unilaterally. Increased employer unilateral authority, however, is not likely to lead to improved public services. It is in unionized workplaces characterized by widespread employee involvement in decision making that we find the greatest improvements in efficiency and productivity.

Canada, on the other hand, has seen an evolving jurisprudence of workers' right to collective voice, as encompassed within section 2(d) of the *Charter*. In its *Fraser* decision, the SCC recognized that collective voice may take many forms apart from a standard *NLRA*-like model. Although different approaches to property rights in the United States and Canada may justify dismissing the applicability of the *Charter* jurisprudence to US private sector labour law, those differences do not apply where the property is publicly owned. US jurisdictions should look to the evolving *Charter* jurisprudence to inspire alternatives to the *NLRA* model, which can expand public employee collective voice in ways that are beneficial to employees, employers, and the public at large.

152. *Ibid*, 5/24-12(c).

